No. 22689

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DESERT OUTDOOR ADVERTISING, INC., a corporation, SEYMOUR BUXBOM, and CAROL BUXBOM,

Appellants,

vs.

COUNTY OF RIVERSIDE, a political subdivision of the State of California, RAYMOND C. SMITH, Building Director of the County of Riverside, C. E. CRABTREE, Land Use Administrator of the County of Riverside, ROSS DONLEY, BYRON MORTON, DISTRICT ATTORNEY of the County of Riverside, Municipal Court, Riverside Judicial District, Municipal Court, Indio Judicial District, the Board of Supervisors of the County of Riverside, WILLIAM E. JONES, PAUL J. ANDERSON, NORMAN J. DAVIS, RAYMOND SEELEY and FLOYD MCCALL as Supervisors of said County, and RIVERSIDE COUNTY PLANNING COMMISSION,

Appellees.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

I.

STATEMENT OF JURISDICTION.

This is an appeal from a decision of the United States District Court for the Central District of California denying an application for injunction and staying further proceedings.

The District Court had jurisdiction pursuant to the following:

(1) 28 U.S.C. Section 1331(a): "the district courts shall have original jurisdiction of all civil

actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs and arises under the Constitution, laws, or treaties of the United States."

(2) 28 U.S.C. Section 1337: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Jurisdiction over the instant appeal is conferred upon this Court by 28 U.S.C. Section 1292(a)(1) which provides:

"(a) The courts of appeal shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;".

II.

STATEMENT OF THE CASE.

Appellants, Desert Outdoor Advertising, Inc., Seymour Buxbom and Carol Buxbom (hereinafter referred to as "Desert Outdoor") have owned and maintained, since prior to 1960, approximately 62 outdoor advertising signs at strategic locations along the federal Interstate and federal-aid primary highways in the County of Riverside [R. T. p. 20, lines 13-18]. The yearly income derived by Desert Outdoor from the

rental of said signs is in excess of $50,000 [R. T. p. 22, line 13].

On September 22, 1960 the County of Riverside, its Board of Supervisors, employees and subdivisions (hereinafter referred to as "Riverside") enacted amendments to the zoning ordinance which provided in part: (1) that all of the unincorporated territory of Riverside not included under any other zone shall be in the M-3 zone; (2) that outdoor advertising signs and structures shall not be permitted in the M-3 zone; (3) a nonconforming outdoor advertising sign or structure may be continued and maintained for a period of five years and (4) any violation of the provisions of said ordinance shall be deemed a misdemeanor, punishable by a fine not to exceed $500 or by imprisonment in the County jail not to exceed 6 months, or by both [R. T. p. 19, line 29, to p. 20, line 10]. Approximately 90% of the area in Riverside is zoned M-3 and all of Desert Outdoor's signs are located in the M-3 zone [R. T. p. 34, lines 4-8].

Under the provisions of the above-mentioned ordinance all of the outdoor advertising signs owned by Desert Outdoor were lawfully in existence on September 1, 1965, the effective date of 23 U.S.C. Section 131(e) (Highway Beautification Act of 1965) [R. T. p. 20, lines 20-26], and on October 22, 1965, the effective date of 23 U.S.C. Section 131(g) [R. T. p. 22, line 31, to p. 23, line 1].

Commencing in the early part of 1966 and continuing to the present time, Riverside has (1) filed and prosecuted two criminal complaints against Desert Outdoor charging said Appellants with the unlawful use of land in the M-3 zone for outdoor advertising signs and structures; (2) threatened to initiate other and further criminal actions against Desert Outdoor for the same purported unlawful use [R. T. p. 20, line 28, to p. 21, line 9]; (3) mailed threatening letters to Desert Outdoor and to individuals who rent their land to Desert Outdoor [R. T. p. 21, lines 10-18 and p. 30 and p. 31] and (4) discriminated against Desert Outdoor in the application of said ordinance [R. T. p. 21, lines 19-25 and p. 34, lines 19-28].

On July 7, 1966, Appellants brought a civil action against Riverside to restrain said County, its employees and agents from doing the above-mentioned acts. A preliminary injunction was issued on July 22, 1966 restraining the further criminal prosecution of Appellants for the alleged violation of the said zoning ordinance as it pertained to outdoor advertising signs [R. T. p. 34, line 29, to p. 35, line 9]. Said preliminary injunction is still in full force and effect. In April, 1967, Riverside commenced writing threatening letters to real property owners who have outdoor advertising signs owned by Desert Outdoor located upon their property. Said letters require the removal of said signs under the threat of criminal prosecution [R. T. p. 35, lines 10-21]. Desert Outdoor brought another action against Riverside for the more recent acts (Riverside Superior Court

No. Indio 10089) and applied for a restraining order which was denied [R. T. p. 36, lines 7-12].

On September 1, 1967, Desert Outdoor filed the first amended complaint for injunction and declaratory relief [R. T. pp. 18-32], order to show cause for a preliminary injunction [R. T. pp. 43-44] and affidavit of Carol Buxbom in support of order to show cause for a preliminary injunction and points and authorities in support thereof [R. T. pp. 33-42]. The order to show cause came on for hearing on September 11, 1967 at which time the attorney for Riverside made an oral motion to dismiss; the hearing was continued to September 25, 1967, to permit counsel to prepare additional points and authorities regarding the District Court's jurisdiction and a three-Judge Court [R. T. pp. 52-72 and pp. 45-49].

Following the hearing and on October 9, 1967, the District Court made its "Order Denying Injunction and Staying Further Proceedings", expressing the view that out of "appropriate regard 'for the rightful independence of state governments' . . . 'that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals.' . . ." and citing *Chicago* in *Fieldcrest Dairies, supra.* The District Court also stated that 23 U.S.C. 131 provides that said signs be "lawfully" in existence and that this was a question of state law [R. T. p. 73, line 28, to p. 74, line 23].

VI.
ARGUMENT.

1. The Highway Beautification Act of 1965 Transcends State and Local Interests in the Interest of Providing Nationwide Regulation and of Protecting the Public Investment, and Is Not Limited by Conflicting Provisions of State or Local Law.

Title 28 U.S.C. Section 1337 provides that "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 23 U.S.C. Section 131, the Highways Beautification Act of 1965 is such an act. In Section 131(a), Congress declared: "that the erection and maintenance of outdoor advertising signs, displays and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel and to preserve natural beauty."

It has been held that the Federal Aid Highway Act, 23 U.S.C. 101 (under the same title as the Highway Beautification Act) being a valid exercise of federal power, is the supreme law of the land which cannot be limited by conflicting provisions of State law.

United States v. Carmack, 329 U.S. 230 (1946);
United States v. Certain Parcels of Land, 209 F. Supp. 483 (D.C. Ill. 1962) Affirmed 314 F. 2d 825;

Harney v. United States, 306 F. 2d 528 (CA Mass. 1962) cert. den. 83 S. Ct. 254.

The general sovereign immunity of the federal government from state or local control of its governmental functions is established under the Supremacy Clause of Article VI of the Constitution.

Mayo v. United States, 319 U.S. 441;

Maun v. United States, 347 F. 2d 970 (9th Cir. 1965).

In the *Maun* case, *supra,* one of the questions presented was whether the Atomic Energy Commission could construct and operate an overhead (rather than underground) electric transmission line in disregard of local authority and regulations governing said lines. The Court stated that the activities of the AEC in connection with the construction and operation of the said lines are "wholly immune from local control." (347 F.2d 970, 974). The Court referred to 23 U.S.C. Section 131 in connection with the federal eminent domain power and stated: "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patroled." (quoting from *Burman v. Parker,* 348 U.S. 26, 33).

2. The Acts of the County of Riverside Are in Direct Conflict With the Provisions of 23 U.S.C. §131(e) and §131(g) and Should Be Enjoined.

23 U.S.C. 131(e) provides in part: "Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970."

The amendments by Riverside to its zoning ordinance on September 22, 1960 banned the future erection of outdoor advertising signs from the M-3 zone in Riverside (approximately 90% of the area in the County); but the said amendments permitted any outdoor advertising signs existing at that time to be maintained as a nonconforming use for a period of five (5) years or until October 22, 1965. [R. T. p. 19, line 29, to p. 20, line 10]. All of Desert Outdoor's signs are located in the said M-3 zone [R. T. p. 34, lines 4-8].

Therefore, all of the said signs owned by Desert Outdoor were "lawfully" in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, and should "not be required to be removed until July 1, 1970", pursuant to 23 U.S.C. 131(e).

The Highway Beautification Act also provides for just compensation to be paid for the removal of said signs, 23 U.S.C. Section 131(g) provides in part:

> "(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays and devices—

"(1) those lawfully in existence on the date of enactment of this subsection," (October 22, 1965).

Unless Riverside is restrained from prosecuting Desert Outdoor, Seymour Buxbom and Carol Buxbom and from threatening to prosecute landowners renting their property to said Appellants, the outdoor advertising signs owned by Desert Outdoor will be removed prior to July 1, 1970 and without the payment of just compensation due to the said threats and acts of the County of Riverside. The County has commenced the prosecutions and sent threatening letters in direct contravention to 23 U.S.C. Section 131(e) and Section 131(g).

3. The Authority Cited by the District Court in Denying the Injunction Is Not Applicable Where the Federal Issue Is of a Non-Constitutional Nature.

The District Court cited *Chicago v. Fieldcrest Dairies,* 316 U.S. 168 (1942) as authority for its order denying the injunction and staying further proceedings. In this case there was no federal statute applicable to the facts; Fieldcrest Dairies was attempting to establish new business in the City of Chicago whose ordinance prevented the use of the type of container used by said Dairy. Desert Outdoor already owns 62 advertising signs in Riverside which come within the purview of 23 U.S.C. 131.

4. Federal Courts Shall Determine the Entire Controversy Including Local Questions Where the Federal Issues Are of a Non-Constitutional Nature.

Where the federal issues are of a non-constitutional nature and Congress has plainly provided for federal jurisdiction, federal courts shall determine the entire controversy including an underlying local question based on local law.

> *Proper v. Clark,* 337 U.S. 472 (1949);
> *Markham v. Allen,* 326 U.S. 490 (1946);
> *Hurn v. Oursler,* 289 U.S. 238 (1932).

Although the zoning ordinance of the County of Riverside is involved herein, there is but one essential "unlawful violation of a right which the facts show" (*Hurn v. Oursler, supra*): the destruction and loss of Desert Outdoor's sign business by the acts of the County of Riverside which, on its face and as applied to Desert Outdoor, violates the provisions of 23 U.S.C. Sections 131(e) and 131(g).

A federal question will not be held in abeyance and the parties remitted to the state forum where no state ruling on the local law could settle the federal questions that would remain or where there is no adequate remedy in the state forum.

> *Public Utilities Comm. of Ohio v. United Fuel Gas Co.,* 317 U.S. 456 (1943).

5. The Equity Jurisdiction of the Federal Courts Will Be Invoked to Enjoin the Bringing of Local Criminal Actions Where Is Is Essential to Protect Rights Asserted.

The federal courts have not been reluctant to enjoin the application of a state or county law and criminal prosecutions brought thereunder where it appears that unless the local government is restrained the applicant will suffer exceptional and irreparable injury, especially to his property rights.

Dombrowski v. Pfister, 380 U.S. 479 (1965);

Utah Fuel Co. v. Nat'l Bit. Coal Comm., 306 U.S. 56 (1939);

Missouri Pacific Ry. Co. v. Tucker, 230 U.S. 340 (1913);

Birch v. McColgan, 39 F. Supp. 358 (DC Cal. 1941);

Alesna v. Rice, 69 F. Supp. 897 (DC Hawaii 1947);

Andrew G. Nelson, Inc. v. Jessup, 134 F. Supp. 221 (DC Ind. 1955);

Beeler v. Smith, 40 F. Supp. 139 (DC Ky. 1941);

Missouri-Kansas-Texas R. Co. v. Williamson, 36 F. Supp. 607 (1941);

Wilder v. Reno, 39 F. Supp. 404 (Pa. 1941).

Even under California law, where a penal statute causes irreparable damage to property rights, the injured party may attack its constitutionality by an action to enjoin its enforcement; the police power which jus-

tifies the taking of the right to engage in a business is to that extent unreasonable and unjustifiable.

Crittenden v. Superior Ct. of Mendocino County, 39 Cal. Rptr. 380, 392 P. 2d 692 (1964);

MacLeod v. City of Los Altos, 6 Cal. Rptr. 326, 182 Cal. App. 2d 364 (1960);

Jones v. City of Los Angeles, 211 Cal. 304, 295 Pac. 14 (1931).

Unless the County of Riverside, its employees and agents are restrained from prosecuting and threatening to prosecute Desert Outdoor, Seymour Buxbom, Carol Buxbom and the landowners who lease their land to said appellants, all of the outdoor advertising signs owned by Desert Outdoor will be caused to be removed or destroyed under such prosecutions and threats thereof. Desert Outdoor originally sought relief in the Superior Court of the County of Riverside. This court has refused to recognize the federal statute (23 U.S.C. 131) or Desert Outdoor's property rights even though it is clear that the said County would suffer no injury in the event a preliminary injunction were issued maintaining the *status quo.*

6. Conclusion.

For the foregoing reasons, Appellants submit that the decision of the Court below should be reversed, with directions to hear the application for injunction on its merits.

Respectfully submitted,

WALDRON & BRYANT,
By KENNETH A. BRYANT,
Attorneys for Appellants.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KENNETH A. BRYANT.